Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, ETC., ET AL., PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 25, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,309)

(35,309)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, Former Administratrix of the Estate of Solomon Klein, Deceased, and Also Individually; AMY K. EISENDRATH, BERNICE K. FRIEDLANDER, and LAWRENCE KLEIN, Petitioners,

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Benjamin B. Pettus, on behalf of the above named petitioners, prays that a writ of certiorari be issued to review the judgment of the Court of Claims in the above case entered June 2, 1930 (not yet reported).

Statement

Solomon Klein, a resident of the State of Illinois, died intestate on September 17, 1919, and his wife, Etta M. Klein, became the administratrix of his estate. She and the other petitioners who are respectively daughters and son of deceased, are his sole surviving heirs at law and next of kin and distributees of his estate.

On July 1, 1918, Solomon Klein conveyed to his wife, the said Etta M. Klein, two parcels of real estate in Cook County, Illinois, by deed providing so far as material here as follows:

[fol. 2] "First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever."

The Commissioner of Internal Revenue held that the aforementioned property should be included in the gross estate of decedent as a transfer to take effect in possession or enjoyment at or after decedent's death within the meaning of section 402 (c) of the Revenue Act of 1918 (C. 18, 40 Stat. 1057, 1097). There was assessed against the estate on this account the sum of $23,387.51 which was paid by the estate on January 21, 1924. It was stipulated by the parties hereto that the conveyance was not in contemplation of death within the meaning of the statute.

The administratrix duly filed a claim for refund of said amount, contending that as possession and enjoyment of the property so conveyed was not deferred until decedent's death, no part of the value thereof should be included for tax purposes. On August 24, 1927, the Commissioner allowed the claim in part and rejected it to the extent of $13,705.92 and interest thereon of $1,126.51, on the ground that the last mentioned amounts represented the tax and interest due as the result of the inclusion as a part of the decedent's gross estate of the aforementioned parcels of real estate after having deducted the value of the life estate of Etta M. Klein. The administration having been closed, the petitioners as sole distributees of the estate, brought suit in the Court of Claims, (R. 1) to recover the amount [fol. 3] of $13,705.92 and $1,126.51 interest paid thereon on the grounds (1) that no part of the conveyance made by Solomon Klein to his wife constituted an interest to decedent for the purpose of inclusion in his gross estate within the meaning of the estate tax law, and (2) that section 402 (c) of the Revenue Act of 1918, so far as it affected the gift in question, was unconstitutional. The Court of Claims rendered judgment for the respondent on June 2, 1930.

Statutes Involved

Section 401 of the Revenue Act of 1918 (C. 18, 40 Stat. 1057, 1096) provides as follows:

"That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *"

Section 402 of the same Act (40 Stat. 1097) provides as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act). * * *"

Questions Presented

1. Whether section 402 of the Revenue Act of 1918 requires that there shall be included as part of the decedent's estate the value of property which had been conveyed to [fol. 4] his wife for life and in fee simple conditioned upon her surviving him with the provision in the deed for a reversion to the grantor in the case of his surviving the grantee.

2. If so, whether Congress has the power to require the inclusion of the value of such property in the computation of decedent's gross estate for estate tax purposes where the transfer was complete and irrevocable prior to the enactment of the taxing statute.

Assignment of Errors

1. The Court of Claims erred in holding that the decedent had an interest in the property, the transfer of which interest took effect and was complete at his death.

2. The Court of Claims erred in holding that the Revenue Act of 1918 which was passed subsequent to the transfer was not unconstitutional and retroactive so far as it attempted to tax the transfer here involved.

3. The Court of Claims erred in giving judgment for the respondent.

Reasons for the Allowance of the Writ

1. Because the case involves an important question of federal tax law which has not been but which should be settled by this Court.

2. Because the provisions of the Revenue Act of 1918, the unconstitutionality of which is involved in this case, are contained in corresponding sections of subsequent Revenue Acts.

3. Because the decision of the Court of Claims in this case is in conflict with a rule of property which is settled by the laws of the State of Illinois of which decedent was a citizen at the time of his death and where the property which is the subject of the tax is located.

[fol. 5] 4. Because the decision of the Court of Claims is inconsistent with the decisions of this Court in the cases of Chase National Bank v. United States, 278 U. S. 327, Reinecke v. Northern Trust Co., 278 U. S. 339, and Nichols v. Coolidge, 274 U. S. 531, and is founded upon an erroneous interpretation of these decisions and is utterly inconsistent with the decision of this Court in the case of May v. Heiner, 281 U. S. 238.

Wherefore it is respectfully submitted that this petition should be granted.

Etta M. Klein (Former Administratrix of the Estate of Solomon Klein, Deceased), Amy K. Eisendrath, Bernice K. Friedlander, Lawrence Klein, by Benjamin B. Pettus, Counsel for Petitioners. Edward Clifford, Colladay, Clifford & Pettus, of Counsel.

[fol. a]

IN COURT OF CLAIMS OF THE UNITED STATES

No. J-124.

ETTA M. KLEIN, Former Administratrix of the Estate of Solomon Klein, Deceased, and Also Individually; Amy K. Eisendrath, Bernice K. Freidlander, and Lawrence Klein

vs.

THE UNITED STATES

No. J-124

[fol. 1] I. HISTORY OF CASE

On March 19, 1928 plaintiffs filed their petition.
On April 28, 1928 defendant filed General traverse.
On December 4, 1929 the case was argued and submitted.
On June 2, 1930 the court filed findings of fact, conclusion of law and opinion.

[fol. 2] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

II. PETITION—Filed March 19, 1928

To the Honorable the Court of Claims:

The plaintiffs respectfully represent:

I

The plaintiff, Etta M. Klein, brings this suit as the former administratrix of the estate of her deceased husband, Solomon Klein, intestate, and also in her individual capacity as surviving widow and a distributee of his estate. [fol. 3] Plaintiffs Amy K. Eisendrath, Bernice K. Friedlander and Lawrence Klein, bring this suit as the children and sole surviving heirs at law and next of kin of said Solomon Klein, deceased, and constitute with said Etta M. Klein, the sole distributees of the estate of Solomon Klein, deceased.

II

That Solomon Klein died intestate on September 17, 1919, being a citizen of the United States and a resident of the City of Chicago and State of Illinois. The plaintiff Etta M. Klein was on September 29, 1919, appointed as administratrix of his estate by order of the Probate Court of Cook County, Illinois, in Administration Cause No. 28,-660, and duly qualified and acted as such administratrix.

Thereafter as provided by the Revenue Act of 1918, the plaintiff, as administratrix of his estate, duly made and filed with the Collector of Internal Revenue for the First District of Illinois, an estate tax return for the estate of Solomon Klein, deceased, wherein the estate tax liability of said estate was indicated to be the sum of $30,305.05, which sum was paid on January 21, 1924.

Thereafter the Commissioner of Internal Revenue notified the said administratrix in writing that upon an audit of said return as the result of an investigation thereof, the estate tax liability of said estate was $67,397.56, and that the additional tax due by the estate was $37,092.51. Subsequently the Commissioner notified the said administratrix that said additional tax was reduced to the sum of [fol. 4] $23,387.51, which amount the said administratrix paid to the said Collector of Internal Revenue, together with interest thereon in the amount of $1,922.25 on January 21, 1924.

Thereafter on October 14, 1927, the said Commissioner of Internal Revenue refunded to the said administratrix and the other plaintiffs herein, in equal portions, the sum of $10,477.33 as tax over-paid, and $2,330.81 as interest on same as a result of a claim for refund therefor filed as provided by law.

The total amount of estate taxes upon the estate of said decedent which has been paid as aforesaid exclusive of amount refunded is $52,315.97, which amount has been covered into the Treasury of the United States and which the said Commissioner of Internal Revenue on August 24, 1927, finally determined to be the estate tax liability of said estate.

III

In arriving at the estate tax liability of said decedent in the sum of $52,315.97, the said Commissioner of Internal

Revenue determined the value of the gross estate of said decedent to be $1,179,493.45, the deductions allowable under the Revenue Act of 1918 to be $171,333.71, and the net estate upon which this aforesaid tax was imposed to be the sum of $1,008,159.74, which said net estate was found by deducting from the value of the gross estate the deductions allowed as aforesaid.

IV

[fol. 5] The Revenue Act of 1918 provides as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *"

The said Commissioner of Internal Revenue in computing the value of the gross estate of the said decedent improperly, erroneously and unlawfully included therein as being the interest therein of the decedent at the time of his death, which after the payment of the charges against the estate and the expenses of the administratrix was subject to distribution as part of his estate, a portion of the value of certain real estate conveyed by said decedent on July 1, 1918, to his wife, Mrs. Etta M. Klein. Said real [fol. 6] estate consisted of two parcels designated as lots 22, 23 and 24, Block 1, Baron's Subdivision of Brand's Addition to Chicago, Illinois, and lots 3, 4, 30 and 31 in Walsh's Subdivision of Block 16, in Walsh & McMullen's Subdivision of S ¾ of SE ¼ of Section 20, Township 39 N, Range 14 E, Cook County, Illinois, and the improvements

thereon. The deed of conveyance thereof to Mrs. Etta M. Klein provided in part as follows:

"First: To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have and hold the said lands in fee simple, unto the sole use of herself, her heirs and assigns forever."

The Commissioner of Internal Revenue has determined that the transfer to the plaintiff Etta M. Klein of the above [fol. 7] mentioned property was not a transfer in contemplation of death, but he has held that the value of said property, less the value of the life estate conferred upon the plaintiff Etta M. Klein, was subject to be included in the gross estate of the decedent for the purpose of estate taxes, and that such last mentioned value constituted a transfer of property "intended to take effect in possession or enjoyment at or after his death" within the meaning of section 402 (c) of the Revenue Act of 1918.

The plaintiffs are advised and believe and therefore aver that the provision of said act in so far as it requires that there shall be included in the gross estate the value of property transferred by decedent prior to its passage merely because the conveyance was intended to take effect in possession and enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation and therefore is unconstitutional. The plaintiffs are further advised and believe that no part of the aforesaid conveyance constituted any interest of the decedent for the purpose of inclusion in his gross estate within the meaning of the Estate Tax law for the reason that no part of the value thereof at the time of his death was subject to the payment of charges against the estate, nor the expenses of its administration,

nor was it subject to distribution as part of his estate, and had such amount been excluded from decedent's gross estate, the value of the net estate would have been the sum of $913,975.63, and plaintiffs aver that the value of the net estate of the decedent was not in excess of the value of said [fol. 8] sum of $913,975.63, and that the estate tax thereupon is the sum of $37,483.54, being $14,832.43 less than the tax liability of the estate as found by said Commissioner of Internal Revenue, and that said sum, together with interest paid thereon in the sum of $1,126.51 should be refunded.

V

Plaintiff Etta M. Klein avers that she was discharged as administratrix of the estate of said decedent on the 7th day of December, 1920, and by order of the Probate Court of Cook County, Illinois, passed that date, her final report as said administratrix, showing the distribution of the balance of the estate of Solomon Klein, deceased, to the plaintiffs herein in accordance with statute, was duly approved.

VI

Plaintiff Etta M. Klein further avers that on or about the 10th day of June, 1927, she duly made and filed with the said Commissioner of Internal Revenue a claim for refund of estate taxes overpaid in the amount of $23,357.51 and of interest overpaid in the amount of $1,922.25, or such greater amount as is legally refundable on account of the said taxes and interest theretofore paid by her as administratrix as aforesaid, and the said plaintiff avers that the said Commissioner of Internal Revenue on August 24, 1927, did reject the said claim for refund in the amount of $14,832.43 taxes and $1,126,51 interest; that subsequently she [fols. 9 & 10] filed a request for reconsideration of said rejected claim and under date of December 21, 1927, the said Commissioner of Internal Revenue affirmed his said rejection of the aforesaid claim for refund and declined to reopen said claim.

VII

No other action has been had on said claim in Congress or any of the executive departments of the Government;

no person other than the plaintiffs herein are the owners thereof or interested therein; no assignment or transfer of this claim or any part thereof or interest therein has been made; the plaintiffs are justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets; and the plaintiffs have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against such Government. The plaintiffs are citizens of the United States and claim the sum of $15,958.94, being the sum of $14,832.43 taxes and $1,126.51 interest paid thereon, with interest on the aggregate sum from January 21, 1924.

Edward Clifford, B. B. Pettus, Attorneys of Record.
Colladay, Clifford & Pettus, of Counsel, 710 Union Trust Building, Washington, D. C.

Duly sworn to by Etta M. Klein, et al. Jurat omitted in printing.

[fol. 11] III. General Traverse—Filed April 28, 1928

Now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. Argument and Submission

On December 4, 1929, this case was argued and submitted on merits by Mr. Benjamin B. Pettus for plaintiff and Mr. Fred K. Dyar for defendant.

[fol. 12] V. **Findings of Fact, Conclusion of Law, and Opinion, Littleton, J.**—Entered June 2, 1930

Mr. Benjamin B. Pettus for the plaintiffs.

Mr. Edward Clifford and Colladay, Clifford & Pettus were on brief.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant.

Mr. W. T. Sabine was on brief.

This is an action to recover $13,705.92, additional estate tax, and $1,1[illegible]51, interest, paid upon the estate of Solomon Klein, deceased, together with interest on the total amount from January 21, 1924.

The question is whether under a conveyance of certain property in July, 1918, the decedent made a transfer of an interest to take effect in possession or enjoyment at or after his death which occurred in September, 1919, and, if so, whether the provision of the revenue act of 1918, which requires the inclusion in the gross estate of the value of this interest, is constitutional.

Special Findings of Fact

1. Etta M. Klein is the widow and Amy K. Eisendrath, Bernice K. Friedlander, and Lawrence Klein are daughters and son, respectively, of Solomon Klein, a citizen and resident of Chicago, Illinois, who died intestate September 17, 1919. Plaintiffs are the surviving heirs at law and next of kin of the decedent and the sole distributees of his estate. The widow was appointed administratrix of decedent's estate September 29, 1919, and duly qualified and acted in that capacity until December 7, 1920, when her final report showing the distribution of the balance of the estate to the plainiffs herein was approved and she was discharged.

2. Within the time provided by the revenue act of 1918, the administratrix filed returns for the estate of decedent showing a total tax of $30,305.05 which was duly paid. Thereafter the Commissioner of Internal Revenue notified her in writing that upon an audit of the return as a [fol. 13] result of an investigation thereof, the total tax liability of the estate was $67,397.56, and that an additional estate tax of $37,092.51 was due. Subsequently the commissioner reduced the amount of additional tax to $31,692.51. The administratrix paid $8,305 on March 8, 1923, and the balance of $23,387.51, together with interest in the amount

of $1,922.25, was paid January 21, 1924. The additional tax to the extent of $23,387.51 resulted from the inclusion in the gross estate of the decedent of the value of certain parcels of real estate described in a deed hereinafter referred to from decedent to his wife, Etta M. Klein, dated July 1, 1918, the commissioner holding that the entire value of the property included in the deed constituted a part of decedent's gross estate as a transfer to take effect in possession or enjoyment at or after the decendent's death within the meaning of section 402 (c) of the revenue act of 1918. It is agreed by all of the parties that the conveyance was not in contemplation of death within the meaning of the statute.

3. The property, the value of which the Commissioner of Internal Revenue included in decedent's gross estate, consisted of two parcels of improved real estate in Cook County, Illinois, and the conveyance from the decedent to his wife, Etta M. Klein, on July 1, 1918, so far as material here, was as follows:

"First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

"Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either

of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other."

4. June 10, 1927, the administratrix filed a claim for refund of $23,387,51, tax, and $1,922.25, interest paid, with interest on the aggregate sum from January 21, 1924, on the ground that possession and enjoyment to the grantee of the property conveyed by the decedent were not deferred until decedent's death and accordingly no part thereof should be included in the gross estate. Subsequently on August 24, 1927, the commissioner allowed the claim in part [fol. 14] and rejected it to the extent of $13,705.92 and interest thereon of $1,126.51, on the ground that the last-mentioned amounts represented the tax and interest due as the result of the inclusion as a part of the decedent's gross estate of the aforementioned parcels of real estate, after having deducted the value of the life estate of Etta M. Klein.

5. October 14, 1927, the commissioner refunded to the plaintiffs herein in equal proportions the amount of $10,477.33 as tax overpaid and $2,330.81 as interest thereon in accordance with the ruling made on the claim for refund. Plaintiffs made application for reconsideration of the commissioner's decision, which application was denied December 21, 1927.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover, and their petition is therefore dismissed.

Judgment is rendered against plaintiffs for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him.

OPINION

LITTLETON, Judge, delivered the opinion of the court:

Plaintiffs contend, first, that under section 402 (c) of the revenue act of 1918, 40 Stat. 1097, Solomon Klein at the time of his death had no interest in the property in question which took effect in possession or enjoyment at or after that event; that the deed of conveyance transferred to his wife title to the lands in fee simple; that the conveyance was complete and irrevocable; and that the grantor retained no beneficial interest in the property conveyed but only a possibility of an interest through reversion; secondly, that if the decedent had an interest in the property at death, the same was not taxable, for under Nichols v. Coolidge, 274 U. S. 531, the revenue act of 1918 is unconstitutional in so far as it undertakes to tax transfers made before its passage.

By the terms of the deed here under consideration the decedent, until his death, had a vested reversion in fee to the property described subject only to the life estate therein provided for his wife, and to the possibility of its being divested by his death during her lifetime. The grantee had no more than a life estate in the property with a contingent remainder, which remainder was based upon a condition precedent, i. e., the death of her husband during her lifetime. Prior to the grantor's death the grantee did not and could not have a vested estate in remainder. Under the deed in question the possession or enjoyment of the rights and benefits of ownership of this remainder in the grantor could in no event be hers until her husband's death; the deed therefore to the extent of the value of this remainder interest reserved was a transfer intended to take effect in possession or enjoyment at the decedent's death within the meaning of section 402 (c) of the revenue act of 1918. The deed here in question was not an absolute conveyance forever in fee simple by the husband with a mere possibility of reverter but was a deed which expressly reserved and accepted the reversion and conveyed only a life estate to the [fol. 15] wife with a contingent remainder, upon a condition precedent, i. e., the decedent's death during her lifetime. It is clear that it was the intent of the decedent, ex-

pressed in unambiguous language in the deed, that his wife should have only a life estate in the property during his lifetime and that only in case of his death during her lifetime should she have a remainder in fee in the land therein described. It appears to be well settled by the law of Illinois that such a condition precedent creates only a contingent remainder under the laws of that State. Bayley v. Strahan, 314 Ill. 213, 145 N. E. 359; Wood v. Chase, 327 Ill. 91, 158 N. E. 470; Meldahl v. Wallace, 270 Ill. 220, 110 N. E. 354; Golladay v. Knock, 235 Ill. 412, 85 N. E. 649; Haward v. Peabody, 128 Ill. 430, 21 N. E. 503.

The Commissioner of Internal Revenue included in the decedent's gross estate the value of his reversionary interest determined by deducting from the value of the property described in the deed, the value of the life estate of Etta M. Klein, as the interest of the decedent in the property which, under the deed, constituted a transfer and which took effect and passed to the wife in possession and enjoyment at his death. In this we think the commissioner was correct. The interest of which the decedent made a transfer intended to take effect in possession or enjoyment at his death was his entire vested reversion of the remainder in the property described in the deed. Until his death, however, the transfer was incomplete. Until that time the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest. Until his death the possession or enjoyment by the decedent's wife of his vested remainder in fee was postponed. The decedent's death was the event which made the transfer complete and effective, and secured to Etta M. Klein the possession and enjoyment of the property contemplated by the statute. The acquisition by the wife of the full benefits of ownership of interest which remained in the decedent became complete only upon his death. It was, therefore, a transfer at his death. Saltonstall v. Saltonstall, 276 U. S. 260; Chase National Bank v. United States, 278 U. S. 327; Reinecke v. Northern Trust Co., 278 U. S. 339; McCaughan v. Girard Trust Co., 11 Fed. (2d) 529; Dean v. Willcutts, 32 Fed. (2d) 374. We are of opinion, therefore, that the decedent had an interest in the property which was the subject of the instrument creating a life estate in his wife, the transfer of

which interest took effect and was complete at his death, and that the value of this interest was a proper item to be included in the gross estate.

Relying upon Nichols v. Coolidge, supra, and the decisions of the United States Board of Tax Appeals in Edward H. Alsop, Executor, 7 B. T. A. 848; James Duggan, Executor, 8 B. T. A. 482; David W. Crews Estate, 8 B. T. A 949; and Edgar M. Morsman, Jr., Administrator, 14 B. T. A. 108, the plaintiffs insist that inasmuch as the instrument in question was executed in July, 1918, the revenue act of 1918 in so far as it undertakes to tax a transfer made before its passage was unconstitutional We think, however, that the decision in Nichols v. Coolidge, supra, goes no further than to hold that where a donor has made a completed gift inter vivos not in contemplation of death and prior to the en- [fol. 16] actment of the act under which the tax is sought to be exacted and where by such transfer he has divested himself of all further control or any other disposition of the property than that provided in the instrument of transfer, any attempt to tax such a gift merely because the transfer was intended to take effect in possession or enjoyment at or after death is arbitrary, capricious, and amounts to confiscation. In such cases there would be no transfer by death, but the property would pass under the provisions of the deed of gift or trust.

In that case Mrs. Coolidge and her husband had executed an instrument in 1907 in which they conveyed property in trust, the income to be paid to them during the life of either of them with remainders over to their sons. Later, in 1917, four years prior to the death of either of them, they assigned all their interest in the income and in the fund itself to their sons, the remaindermen. No claim was made that the gift inter vivos, thus completed, was made in contemplation of death and as they had divested themseles of every interest in the property, the value of the property transferred by Mrs. Coolidge was held to have been improperly included in her gross estate. In so holding the court said:

"The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire

good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?

* * * * * * *

"* * * And we must conclude that section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation."

The language quoted is very broad but we think in view of subsequent decisions of the court its application to "property transferred" refers to completed transfers of property where no interest of value is transferred by death. The transfer there involved, if not complete and beyond control of the donors in 1907, had been completed four years before the death of Mrs. Coolidge. She had divested herself of every interest in the property at that time and neither possession nor enjoyment was postponed until her death. This view finds support in subsequent decisions of the court in Chase National Bank v. United States, supra, and Reinecke v. Northern Trust Co., supra; in the latter case. the court in referring to two trusts created in 1903 and 1910, respectively, and distinguishing the Coolidge case, at page 345, said:

"As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of Nichols v. Coolidge, 274 U. S. 531. In that case it was held that the provisions of the similar section 402 of the 1918 act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with [fol. 17] the fifth amendment of the Federal Constitution and void, as respects transfers completed before any such statute was enacted. But in Chase National Bank v. United States, decided this day, ante, p. 327, the decision is rested on the ground, earlier suggested with respect to the fourteenth amendment in Saltonstall v. Saltonstall,

276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence section 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in Chase National Bank v. United States, supra, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed."

At pages 346-348, the court in connection with certain trusts created in 1919 which were held not to be taxable as a part of the estate pointed out that the reserved powers of management did not save to decedent any control over the economic benefits or the enjoyment of the property and that the shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made, and said—

"The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession, or enjoyment. In the light of the general purpose of the statute and the language of section 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under section 401."

In our opinion the same rule as was applied to the trusts created in 1903 and 1910 must be applied where, by the reservation of a remainder or reversion in fee, as in this case, in the grantor or donor until his death, the transfer is not complete; and the act in force at the date of the decedent's death taxing the interest which passes at death is neither retroactive nor unconstitutional. Cf. Cooper v. United States, — U. S. —, decided February 24, 1930, and May et al., Executors, v. Heiner, — U. S. —, decided April 14, 1930. The date of the execution of the trust, or con-

veyance, is not controlling but the important thing is whether under such instruments there remains in the decedent any interest in the property which passes at his death. In this case we think there was such an interest.

Plaintiffs are not entitled to recover and the petition is dismissed. It is so ordered.

Williams, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 18] VI. JUDGMENT

At a Court of Claims held in the city of Washington on 2nd day of June, 1930, judgment was ordered to be entered, as follows:

Judgment is rendered against the plaintiffs for the cost of printing the record herein, the amount thereof to be ascertained by the Clerk and collected by him.

No printing having been done in this case, no costs are taxed.

[fol. 19] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme
F I L
SEP
CHARLES ELM

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, AND ALSO INDIVIDUALLY AMY K. EISENDRATH, BERNICE K. FRIEDLANDER, AND LAWRENCE KLEIN, PETITIONERS,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BENJAMIN B. PETTUS,
Counsel for Petitioner.

EDWARD CLIFFORD,
COLLADAY, CLIFFORD & PETTUS,
Of Counsel.

National Publishing Co., Washington, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, AND ALSO INDIVIDUALLY AMY K. EISENDRATH, BERNICE K. FRIEDLANDER, AND LAWRENCE KLEIN, PETITIONERS;

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

I.

Opinion of the Court Below

The special findings of fact and conclusion of law of the Court of Claims have not been officially reported but will be found printed at R. 11-13.

II.

Jurisdiction

The jurisdiction of this court is invoked under section 3 (a) of the Act of February 13, 1925 (43 Stat. 936).

The judgment of the Court of Claims was entered on June 2, 1930 (R. 19). Application for writ of certiorari was presented on August 26, 1930 (R. 1).

The suit brought in the Court of Claims is for the recovery of estate taxes erroneously and illegally assessed and collected, jurisdiction of which is conferred upon the Court of Claims by section 145 of the Judicial Code and section 3226 of the Revised Statutes.

III.

The Facts

A full statement of the case has been set out in the petition (R. 1-2) and in the interest of brevity is not repeated at this point.

IV.

Statutes Involved

The statutes involved in this case are printed in the petition (R. 2-3) and to avoid repetition counsel begs leave to refer thereto.

V.

Specifications of Errors

1. The Court of Claims erred in holding that the decedent had an interest in the property, the transfer of which interest took effect and was complete at his death.

2. The Court of Claims erred in holding that the Revenue Act of 1918 which was passed subsequent to the transfer was not unconstitutional and retroactive so far as it attempted to tax the transfer here involved.

3. The Court of Claims erred in giving judgment for the respondent.

VI.

THE ARGUMENT

Summary of Argument

A. The deed made by decedent on July 1, 1918, was a completed gift and was not a transfer intended to take effect in possession or enjoyment at or after his death within the meaning of section 402 (c) of the Revenue Act of 1918.

B. Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

Point A

The deed made by decedent on July 1, 1918, was a completed gift and was not a transfer intended to take

effect in possession or enjoyment at or after his death within the meaning of section 402 (c) of the Revenue Act of 1918.

By the deed in this case Solomon Klein conveyed to his wife certain lands "for and during the term of her natural life, and if she shall die prior to the decease of said grantor, then *in that event* she shall by virtue hereof take no greater or other estate in such lands." It was further provided in the deed that "the reversion in fee in and to the same shall *in that event* remain vested in the grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance." (Italics supplied.)

The deed further provided in the succeeding paragraph that "*upon condition* and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee *shall by virtue of this conveyance* take, have and hold the said lands in fee simple." (Italics supplied.)

The decision of the Court of Claims was based upon the theory that decedent had an interest in the property, the transfer of which was complete at his death, and that the value of this interest was included in his gross estate under section 402 (c) of the Revenue Act of 1918.

We submit that the nature of the deed plainly indicates that this was a grant of a determinable fee to the grantee Etta M. Klein. The phrase "if she shall die prior to the decease of said grantor" refers to a condition which might not happen and in fact did not happen. As that event did not happen before the death

of the grantor, the determinable fee was by his death ipso facto enlarged into a fee simple.

Challis Real Property, pp. 197, 200.

Friedman v. Steiner, 107 Ill. 125.

All that remains in the grantor after conveying a determinable fee is the possibility of a reverter.

Brattle Square Church Prop. v. Grant, 3 Gray (Mass.) 142.

Hunter v. Middleton, 13 Ill. 50.

The grantor conveyed the whole estate except a contingent reversion dependent on the grantee failing to survive him. The deed operated as a conveyance of the fee with limitations over, which may terminate the estate granted upon the conditions of the deed.

Stoller v. Doyle, 257 Ill. 369; 110 N. E. 959.

Morton v. Babb, 251 Ill. 488; 96 N. E. 279.

Bowler v. Bowler, 176 Ill. 541; 52 N. E. 437.

Chapin v. Nott, 203 Ill. 341; 67 N. E. 883.

Sterling v. Huntley, 139 Ga. 21; 76 S. E. 325.

Thomas v. Williams, 105 Minn. 88; 17 N. W. 155.

The clause in the habendum providing for a reversion to the husband limits the conveyance to a conditional fee liable to be defeated by the wife's death before the husband.

Fogarty v. Stack, 86 Tenn. 610; 8 S. W. 846.

Case v. Dwire, 60 Iowa 442; 15 N. W. 265.

Being contingent there is no interest in Solomon Klein which ceased or was transferred by his death; and until the contingency happened, the whole title is in the grantee.

North v. Graham, 235 Ill. 178; 85 N. E. 267.

Hart v. Lake, 273 Ill. 60; 112 N. E. 286.

Point B

Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

In *Nichols v. Coolidge*, 274 U. S. 531, 543, this Court with respect to the statute here under consideration held:

> "In so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Saltonstall v. Saltonstall*, 276 U. S. 260, and again in *Chase National Bank v. United States*, 278 U. S. 327, an outstanding power of disposition was reserved exclusively to the transferror for his own benefit and this court held that the non-exercise of that power was as much a disposition of the property testamentary in nature as would be its exercise at death. It was held that the consequent passing to designated beneficiaries of all rights under the property free from the possibility of its exercise is the legitimate subject of a transfer tax.

In the case at bar the reservation of rights could not be transferred except subject to defeasible fee in the grantee.

In *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347, the Court said, speaking of an equivalent provision of the Revenue Act of 1921:

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

In *May v. Heiner*, 281 U. S. 238, 243, it was said:

> "It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

In *Tyler v. Tyler*, 281 U. S. 497, it was held in a case of tenancy by the entireties that the wife's rights were hedged about at all points by the equal rights of her husband.

> "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment * * *. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other." (P. 504.)

There is, however, a salient difference between the interest here under consideration and the rights of the parties in the Tyler case. In the Tyler case each of the parties owned all of the property with equal rights therein, but here the grantor Klein had only a contingent interest in the property which he had theretofore irrevocably transferred, and this contingent interest was prevented from passing by the fact of his death. Thus, the interest possessed by him immediately prior to death was "obliterated by that event;" and nothing of a property interest "passed from him to the living." *May v. Heiner, supra.*

It is therefore respectfully submitted that in so far as section 402 (c) of the Revenue Act of 1918 operates to impose an estate tax upon any part of the transfer made by Solomon Klein to his wife as hereinbefore set forth, the statute is beyond the constitutional power of Congress and the decision of the Court below should therefore be reversed.

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and to that end a writ of certiorari should issue and this Court should review the decision of the Court of Claims and finally reverse it.

BENJAMIN B. PETTUS,
Counsel for Petitioner.

EDWARD CLIFFORD,
COLLADAY, CLIFFORD & PETTUS,
Of Counsel.

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CHARLES ELMORE

Supreme Court of the United States

October Term, 1930.

No. 387

ETTA M. KLEIN, former administratrix of the estate of Solomon Klein, deceased, and also individually AMY K. EISENDRATH, BERNICE K. FRIEDLANDER and LAWRENCE KLEIN, *Petitioners*,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

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Supreme Court of the United States

October Term, 1930.

No. 387

ETTA M. KLEIN, former administratrix of the estate of Solomon Klein, deceased, and also individually AMY K. EISENDRATH, BERNICE K. FRIEDLANDER and LAWRENCE KLEIN, *Petitioners*,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

OPINION OF THE COURT BELOW

The opinion of the Court of Claims, rendered June 2, 1930, has not been officially reported but will be found printed at R. 11-13.

JURISDICTION

The jurisdiction of the Court is invoked under section 3 (b) of the Act of February 13, 1925 (43 Stat. 936, 939).

The judgment of the Court of Claims was entered on June 2, 1930 (R. 19). Application for writ of certiorari was presented on August 26, 1930 (R. 1), and certiorari was granted on October 20, 1930.

The suit is for the recovery of estate taxes erroneously and illegally assessed and collected jurisdiction of which is conferred upon the Court of Claims by section 145 of the Judicial Code, and section 3226 Revised Statutes.

QUESTIONS PRESENTED

1. Whether section 402 of the Revenue Act of 1918 requires that there shall be included as part of the decedent's estate the value of property which had been conveyed to his wife for life and in fee simple conditioned upon her surviving him with the provision in the deed for a reversion to the grantor in the case of his surviving the grantee.

2. If so, whether Congress has the power to require the inclusion of the value of such property in the computation of decedent's gross estate for estate tax purposes where the transfer was complete and irrevocable prior to the enactment of the taxing statute.

THE STATUTES

The Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1096) provides:

"Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: * * *."

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act). * * *."

STATEMENT

The facts are not in dispute and the case was submitted to the Court of Claims upon an agreed statement of facts (R. 11-13). So far as material to the issues involved, the facts are as follows:

Solomon Klein, a resident of the State of Illinois, died intestate on September 17, 1919, and his wife, Etta M. Klein, one of the petitioners herein, became the administratrix of his estate. She and the other petitioners, who are respectively daughters and son of decedent, are his sole surviving heirs and next of kin and distributees of his estate (R. 11).

On July 1, 1918, Solomon Klein conveyed to his wife, the said Etta M. Klein, two parcels of real estate in Cook County, Illinois, by deed providing as follows:

> "First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.
>
> "Second. Upon condition and in the event that said grantee shall survive the said

grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

"Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other."

Upon the audit of the returns of the estate, the Commissioner of Internal Revenue included in the gross estate the value of the aforementioned property as a transfer intended to take effect in possession or enjoyment at or after decedent's death

within the meaning of section 402 (c) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1097) (R. 12). It was agreed that the conveyance was not in contemplation of death (R. 12).

A claim for refund of additional tax paid thereon on the ground that the possession and enjoyment of the property so conveyed was not deferred until decedent's death, was rejected to the extent of the tax arising from the inclusion of the value of the realty, after having deducted therefrom the value of the life estate of the grantee. Suit was filed in the Court of Claims on March 19, 1928, to recover this amount and judgment was entered dismissing the petition on June 2, 1930 (R. 13). The petition for certiorari was not opposed.

The Court of Claims rendered an opinion (R. 14-19) in which it was held that the decedent had made a transfer intended to take effect in possession or enjoyment at his death; that this interest was a vested reversion of the remainder in fee of the property and that decedent's death was the event which made the transfer complete and effective and secured to the grantee Etta M. Klein the possession and enjoyment of the property contemplated by the statute. (R. 15.)

The court further held that where there is a reservation of a remainder or reversion in fee by the donor, the transfer is not complete and that the taxing act in force at the date of donor's death which taxes such interest is neither retroactive nor unconstitutional (R. 18).

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Claims erred in holding that the decedent had an interest in the property, the transfer of which interest became complete and effective only upon his death.

2. The Court of Claims erred in holding that the Revenue Act of 1918 which was passed subsequent to the effective date of the transfer here involved was not unconstitutional and retroactive.

3. The Court of Claims erred in giving judgment for the respondent.

SUMMARY OF ARGUMENT

1. The transfer in this case passed both possession and enjoyment from Solomon Klein in his lifetime and did not take effect either in possession or enjoyment at or after his death.

2. Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

ARGUMENT

I

The transfer in this case passed possession and enjoyment from Solomon Klein in his lifetime, and did not take effect either in possession or enjoyment at or after his death.

By the deed in this case Solomon Klein conveyed to his wife certain lands "for and during the term of her natural life, and if she shall die prior to the decease of said grantor, then *in that event* she shall by virtue hereof take no greater or other estate in such lands". It was further provided in the deed that "the reversion in fee in and to the same shall *in that event* remain vested in the grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance". (Italics supplied.)

The decision of the Court of Claims was based upon the theory that decedent had an interest in the property, the transfer of which was complete at his death, and that the value of this interest was required to be included in his gross estate by section 402 (c) of the Revenue Act of 1918.

In determining the estate created by a deed, a court will consider the deed as a whole. This was an ordinary warranty deed of conveyance. There is nothing in the granting clause to indicate the nature of the estate conveyed. It is only in the habendum that the precise nature of the estate conveyed is considered.

> "If the granting clause mentions no estate, the habendum becomes efficient to declare the intention of the grantor and will rebut any implication that would otherwise arise from the omission in this respect in the granting clause." *Riggin v. Love*, 72 Ill. 553.

In the case at bar, the habendum is divided into two clauses in the first of which the petitioner, Etta M. Klein, is given a life estate and nothing more unless she survives the grantor. In the second clause, however, a conveyance in fee is made to the petitioner, Etta M. Klein, upon the condition and in the event that she shall survive the said grantor.

There is thus in the same instrument a conveyance of a life estate and a conditional fee simple estate to the same person, namely, Etta M. Klein.

If the terms of the deed vest a fee in the first taker, other parts of the instrument showing an intention to give a less estate will not control.

Carpenter v. Van Olinder, 127 Ill. 42.

A deed to a grantee for life with remainder to the grantor if he should survive the grantee, otherwise to the heirs of the grantor, gives the heirs no estate by purchase but leaves in the grantor a reversion which he is capable of transferring by a subsequent deed.

Blankenship v. Blankenship, 116 Tenn. 394; 92 S. W. 854.

See also *Turner v. Hause*, 199 Ill. 464.

We submit that the deed herein plainly indicates an intention to grant not only a life estate but also a determinable or a conditional fee to the grantee, Etta M. Klein; and that the greater estate or fee naturally swallows up the lesser or life estate when created by the same instrument.

The phrase, "if she shall die prior to the decease of said grantor" refers to a condition which might

not happen and, in fact, did not happen. As the event did not happen, the determinable fee was at the death of the grantor enlarged into a fee simple.

Challis, Real Property, pp. 197, 200.
Friedman v. Steiner, 107 Ill. 125.

In the last named case it was held:

> "One of the peculiarities of a fee determinable is that it may become a fee simple absolute upon the happening of any event which renders impossible the event or combination of events upon which the estate is to end. * * * It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold."

The court below held that until the death of the grantor "the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest". (R. 15.)

In *Brattle Square Church Prop. v. Grant*, 3 Gray (Mass.) 142, the court held:

> "All the estate vested in the first grantee notwithstanding the qualification annexed to it. * * * Until the happening of the contingency or breach of condition by which the precedent estate is determined, it retains all

> the characteristics and qualities of an estate in fee. Although defeasible, it is still an estate in fee."

The court further held in this case that there is no remainder because the fee, being exhausted by the prior gift, there is nothing left to constitute a remainder.

In *Hart v. Lake*, 272 Ill. 60, 65, 122 N. E. 286, the court said:

> "A conveyance upon a condition subsequent passes a base or determinable fee, leaving no reversion in the grantor. What is left in him is only a right to defeat the estate so granted upon the happening of the contingency, with a naked possibility of a reverter which is incapable of alienation or devise although it descends to his heirs. Possibility of reverter devotes no estate, but as the name implies, only the possibility to have the estate at a future time."

The right or interest under the possibility of reverter is very like though not strictly identical with a reversion.

Kales on Future Interests, Sec. 1.

The difference between a reversion and a reverter is pointed out in *Whitehead, Law of Real Property in Illinois*, Vol. 1, Sec. 61, as follows:

> "A reversion arises by operation of law and

> not by deed or will and it is a vested interest or estate. A reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate, but the estate may continue forever."

Directing a reversion is inapt as a reversion arises by an operation of law and not by deed or will.

Boyce v. Mosely, 102 S. C. 361, 86 S. E. 771.

A reversioner has no right to possession during the continuance of the preceding estate. (Lane v. Thompson, 43 N. H. 320.)

In *Hunter v. Middleton*, 13 Ill. 50, the Court said:

> "The title may revert to the former owner * * * but until the estate is thus defeated, the fee is as completely out of him as if he had made an absolute and unconditional conveyance. * * * Having neither the legal title nor the exclusive right of possession, he cannot bring trespass for any injury to the freehold. He had no title to be assailed, no possession to be invaded."

We submit that it is likewise with Solomon Klein, the grantor herein. After the conveyance and until the happening of the condition he had no legal title or possession of the fee, and upon his death there was no interest, the value of which

was required to be included in his estate for taxation.

See also *Brown v. Brown*, 247 Ill. 528, 534; 93 N. E. 357.

A statutory warranty deed containing a restriction that in case the grantee shall die before his wife dies, and any children survive him, the surviving children and his wife shall have the use of the land during the wife's lifetime, when it shall go to the children if any are living, but if at the death of the grantee no children survive him, the title shall be in the grantor, was held in *Stoller v. Doyle*, 257 Ill. 369, 110 N. E. 959, to create a fee simple in the grantee which ceases to be a fee simple upon the one contingency that the grantee's wife shall survive him.

The grantee in such case was held to take a fee with limitations over which may terminate the estate.

Other cases involving a conveyance of a base or determinable fee similar to that in the case at bar are the following:

Sterling v. Huntley, 139 Ga. 21; 76 S. E. 325.

Thomas v. Williams, 105 Minn. 88; 17 N. W. 155.

Fogarty v. Stark, 86 Tenn. 610; 8 S. W. 846.

Case v. Dwire, 60 Iowa 442; 15 N. W. 265.

Looking at the deed from the standpoint of Solomon Klein's estate (*Y. M. C. A. v. Davis*, 264 U. S. 47), we respectfully submit that the said Solomon Klein had at the time of his death neither possession nor enjoyment as defined in the statute of any

part of the property conveyed to Etta M. Klein, the grantee under this deed.

See *North v. Graham*, 235 Ill. 178; 85 N. E. 267.

II

Inasmuch as the transfer in question was complete and irrevocable, the Revenue Act of 1918 so far as it undertakes to tax such a transfer made before its passage is unconstitutional and void.

In *Nichols v. Coolidge*, 274 U. S. 531, 543, this court with respect to the statute here under consideration held:

> "In so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Saltonstall v. Saltonstall*, 276 U. S. 260, and again in *Chase National Bank v. United States*, 278 U. S. 327, an outstanding power of disposition was reserved exclusively to the transferror for his own benefit and this court held that the non-exercise of that power was as much a disposition of the property testamentary in nature as would be its exercise at death. It was held that the conse-

quent passing to designated beneficiaries of all rights under the property free from the possibility of its exercise is the legitimate subject of a transfer tax.

In the case at bar when the grantor made and delivered an irrevocable deed *inter vivos*, his possession and enjoyment of any interest in the property ceased and determined, and all that his death did was to forever divest him of the possibility of again ever coming into possession and enjoyment.

Reinecke v. Northern Trust Co., 278 U. S. 339, involved five irrevocable trusts in all of which it was provided that the corpus should not come into the possession of the beneficiaries until after the grantor's death. Some of them provided for accumulation of the income in whole or in part during the grantor's lifetime; and some of them provided that some or all of the income should be paid to beneficiaries during the grantor's lifetime, although the corpus was not to come to them until after her death.

In that case this court held as follows (p. 347):

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos* equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the

donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute."

In *May v. Heiner*, 281 U. S. 238, a contingent equitable life estate was reserved to the grantor if she should survive her husband, an event which never happened. The Government contended that the reservation of this contingent life estate operated to retain an interest in the property which was taxable at death. This court held that the transfer was not taxable as follows (p. 243):

"It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

As in the May case the title to the property in the case at bar had been definitely fixed in the deed of Solomon Klein to his wife, and the only interest therein which Mr. Klein possessed was that the property might possibly revert to him at the death of his wife. This was in fact no interest but an interest to arise, and as the court has said in the May case, the mere possibility was obliterated by the grantor's own death in the grantee's lifetime.

The fact that the deed in the case at bar provided that the grantee should pay taxes, keep buildings in repair and fully insured, and upon their damage or destruction should apply the insurance money to reconstruction, if required, we submit is similar to that in the case of *Reinecke v. Northern Trust Co., supra*, where the grantor reserved the right to control trust investments, vote trust stock during his lifetime, and even to alter the trusts with the consent of a majority of the beneficiaries, which provision the court said did not render the transfer in that case incomplete.

In *Tyler v. Tyler*, 281 U. S. 497, the question presented was as to the constitutionality of determining the value of decedent's net estate by including therein the value of property held by tenancy by the entireties. In its opinion the Court pointed out that Section 201 of the taxing act imposed the tax "upon the transfer of the net estate", and if that section stood alone, the inclusion of such property (jointly owned property) in the gross estate of the decedent probably could not be justified by the terms of the statute. But Section 202 definitely included such jointly owned property and on this ground the tax was sustained.

In view of the statement of the Court in *Reinecke v. Northern Trust Co., supra*, that by reason of the fact that Section 401 explicitly taxes net estates of decedents, it is doubtful whether the phrase, "to take effect in possession or enjoyment at or after his death", includes any others than

those passing as transfers at death we submit that the Tyler decision is not in point here.

In any event a salient difference exists between the interest here under consideration and the rights of the parties in the Tyler case. In the Tyler case each of the parties owned all of the property with equal rights therein, but here the grantor Klein had only a contingent interest in the property, the title to which he had heretofore irrevocably transferred, and this contingent interest was prevented from ever arising by the fact of his death. Thus the interest possessed by him prior to death was "obliterated by that event", and nothing of a property interest "passed from him to the living". *May v. Heiner, supra.*

It seems to us that the Court below has overlooked the fact that it was Mrs. Klein's death, *not her husband's*, which determined her estate, whether life or fee simple.

It is indisputed that if the decedent had no interest which passed by reason of his death with respect to the property which had been transferred in his lifetime, there is nothing that can be taxed with respect to such prior transferred property. This property passed to the grantee not by reason of the death of Solomon Klein, but because he had declared such should be the case by the execution and delivery of the deed of conveyance *inter vivos*. When he executed and delivered such deed he divested himself of all right, title and interest in and to the property, and when he subsequently died, nothing of a property interest passed to the

grantee which would have been the case otherwise. *Reinecke v. Northern Trust Co., supra.*

CONCLUSION

It is respectfully submitted that in so far as Sec. 402 (c) of the Revenue Act of 1918 operates to impose an estate tax upon any part of the transfer made by Solomon Klein to his wife as hereinbefore set forth, the statute is beyond the constitutional power of Congress and the decision of the court below should be reversed.

Respectfully submitted,

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February 3, 1931.

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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1930

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 387

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE Estate of Solomon Klein, deceased, etc., et al., petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on June 2, 1930. (R. 19.) The petition for certiorari was filed August 26, 1930. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether a deed of real property by the decedent should be construed to result in a transfer intended to take effect in possession or enjoyment at his death; and, if so construed, whether the property so transferred under a deed executed prior to the enactment of the Revenue Act of 1918, but after the enactment of the Revenue Act of 1916, may constitutionally be included under Section 402 (c) of the Revenue Act of 1918, in the gross estate of the transferor who died on September 17, 1919.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, pp. 6–8, *infra*.

STATEMENT

By a deed dated July 1, 1918, the decedent conveyed certain real estate in Illinois to his wife in the following terms (R. 12):

> First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

Said grantee covenants with said grantor that she will during the lifetime of said grantor, promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other.

It is agreed that the conveyance was not in contemplation of death. (R. 12.) The grantor died intestate on September 17, 1919. (R. 11.) The grantee, his widow, survived him. (R. 11.)

Upon auditing the returns of his administratrix the Commissioner of Internal Revenue included in the gross estate the value of the real estate conveyed on July 1, 1918. (R. 12.) A claim for refund was rejected to the extent of the tax due as the result of the inclusion in the gross estate of the value of the realty after having deducted the value of the life estate of the grantee. (R. 13.) The petition was filed in the Court of Claims on March 19, 1928, and dismissed by that court on June 2, 1930. (R. 5.)

DISCUSSION

We submit that the decision below is correct. However, the transfer held taxable as one intended to take effect in possession or enjoyment at death is similar in some respects to the transfer held not taxable by this Court in *May* v. *Heiner*, 281 U. S. 238. In that case after the execution of the deed the settlor had no interest in the corpus of the trust, but only the right to the income during her life. In the instant case the settlor retained an interest in the corpus of the trust. He held, until his death, the fee simple in reversion, subject to be divested upon his wife's surviving him. A transfer under a trust deed creating estates like those in the instant case was held taxable by the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner* v. *McCormick*, decided September 20, 1930, and not yet reported. This case, as we contend, is distinguishable from *May* v. *Heiner, supra*,

and was correctly decided below, but the question involved is an important one, which will arise in many cases. Accordingly we do not oppose the granting of the writ of certiorari.

Respectfully submitted.

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Attorneys.

OCTOBER, 1930.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provided in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages.]
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (*b*) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of

a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097) provides in part:

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

[Here follows a table of percentages, materially higher than those in the Revenue Act of 1916.]

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at

any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title * * *.

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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1930

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14) is reported in 42 F. (2d) 596.

JURISDICTION

The judgment of the Court of Claims was entered on June 2, 1930. (R. 19.) The petition for a writ of certiorari was filed August 26, 1930, and the writ was granted October 20, 1930. (R. 21.) The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether a deed of real property made by the decedent should be construed to be a transfer intended to take effect in possession or enjoyment at his death; and, if so construed, whether Section 402 (c) of the Revenue Act of 1918 is constitutional in including in the measurement of the estate tax ~~placing an estate tax upon~~ such a transfer made by a deed executed prior to the enactment of the Revenue Act of 1918 but after the enactment of the Revenue Act of 1916 and the Revenue Act of 1917.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, infra, pp. 15–17.

STATEMENT

By deed dated July 1, 1918, the decedent, a resident of Illinois, conveyed certain real estate in Illinois to his wife. The deed contained the following terms (R. 12):

> First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

Said grantee covenants with said grantor that she will during the lifetime of said grantor promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other.

It is agreed that the conveyance was not in contemplation of death. (R. 12.) The grantor died intestate on September 17, 1919. (R. 11.) Upon auditing the returns of the administratrix, the Commissioner of Internal Revenue included in the

gross estate the value of the real estate conveyed on July 1, 1918. (R. 12.) A claim for refund was rejected to the extent of the tax arising from the inclusion in the gross estate of the value of the realty after having deducted the value of the life estate of the grantee. (R. 13.) The petitioners then brought suit in the Court of Claims on March 19, 1928. That court dismissed the petition on June 2, 1930. (R. 19.).

SUMMARY OF ARGUMENT

The transfer was one intended to take effect at death. The grantor's intent as expressed in the deed indicates that he anticipated a transfer of a substantial property interest at his death under that deed. He retained a reversion in fee in the realty, and conveyed to his wife a life estate together with a contingent remainder in fee to vest in her if she should survive him. Under the deed he controlled the insurance of the property even during her life estate. He owned the fee until his death and then his property rights passed to the grantee.

The statute, if construed to include in the gross estate the value of the realty less that of the grantee's life estate, is constitutional. No unexpected tax is imposed by the statute, for when the deed was drawn there was an estate tax in force. The transfer taxed occurred at the grantor's death after the enactment of the statute. Substantial property rights were transferred to the grantee at

the death of the grantor and there was no abuse of the conceded power of Congress to tax transfers at death in imposing an excise upon that transfer.

ARGUMENT

I

THE TRANSFER WAS INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH

The Government contends that upon the death of the grantor in this case, a substantial property interest passed to his wife which she had never enjoyed before. The petitioners contend that after making the conveyance of July 1, 1918, their decedent had no legal estate in the land and no interest which could be included in his estate for Federal estate taxation.

The intent of the grantor as evidenced by the language of the deed of conveyance must control this question. By the first paragraph the grantee is given a life estate and the grantor retains the reversion of the fee. The limitations of the first paragraph are like those in the deed of realty construed in *Akers* v. *Clark*, 184 Ill. 136, 138–139. There the grant was in part:

> William Clark conveys and warrants to Mary J. Clark during her natural life and at her death to revert back to my heirs.

The court held that the wife, Mary, was given a life estate and that "the remainder, after the expiration of her life estate, under the law as well

as under the deed, reverted to the grantor or his heirs. * * * The fee remained vested absolutely in the grantor." Similarly in the instant case the deed leaves the fee in the grantor.

The second paragraph is not inconsistent with the first, but creates a contingent interest for the grantee to follow her life estate. Under it "upon condition and in the event that the said grantee shall survive the said grantor," she shall at the moment of survival and upon that contingency only be seized in fee of the property. The second paragraph of the deed grants to her, in addition to the life estate given her by the first paragraph, a remainder in fee, contingent upon her surviving the grantor. The words *"then and in that case only"* indicate that she is intended not to get the fee upon delivery of the deed, but only at a future date and only if she outlives the grantor.

The petitioners contend that under this second paragraph the wife is given a determinable fee and the grantor a mere possibility of reverter. This ignores the express language of the first paragraph and overlooks the fact that the wife's remainder interest is contingent. In Gray's *Rule Against Perpetuities,* 3rd Edition, it is stated in paragraph 113, p. 94:

> A remainder is created by the livery of seisin of the particular estate; if it is not ready to come into possession whenever and however the previous estates determine, it is

a contingent remainder. A contingent remainder is, in truth, not an estate, but a possibility of an estate; its becoming an estate depends upon the condition precedent of the first contingent fee simple limited not vesting; while a reversion is independent of the ownership created by the livery, it is an actual estate, and, therefore, any condition affecting it is a condition which, as to it, is subsequent.

In *Stevens* v. *Van Brocklin*, 295 Ill. 434, the Supreme Court of Illinois applied this rule to similar facts and held contingent a remainder which did not stand ready to take effect in possession whenever the preceding freehold estate determined. In the instant case, the only estate ready to come into possession upon the termination of the wife's life estate was the grantor's reversion. The wife's remainder interest was contingent because, under the express terms of the deed, it could not come into possession upon the termination of her life estate unless the grantor were then dead.

The cases relied upon by the petitioners are of conveyances and devises under limitations different from those in the deed in the instant case.

In *Stoller* v. *Doyle*, 257 Ill. 369, the court construed the instrument there under consideration as conveying an estate in fee subject to a condition subsequent. In the instant case the deed does not convey a fee to the wife subject to a condition subsequent. It conveys to the wife a life estate and

reserves to the husband the reversion in fee. The passing of the fee from the husband to the wife can only take effect upon his death and her ultimate estate in fee is expressly dependent upon the happening of that event as a condition precedent.

But regardless of the correct terminology of the estates created by the conveyance in the instant case, we submit that until his death the grantor retained a real and substantial interest in the property. Under the third paragraph of the deed, if the insured buildings on the land were destroyed, "the insurance moneys" were to be put back into improvements on the realty or *with the grantor's written consent* invested so that while the grantee received the income for her life, the capital would belong to that one "who shall survive the other." The fire insurance was to be taken out in the names of both the grantor and grantee in companies acceptable to the grantor. The language of the conveyance, taken as a whole, indicates an intent by the grantor to keep a very genuine interest in the property during his life. He did not intend that his wife could convey away the fee, a power which she would have under the petitioners' construction of the deed as vesting her with a fee simple determinable. See *Friedman* v. *Steiner*, 107 Ill. 125, 133, where the court stated that the holder of the determinable fee was "clothed with power to convey in fee simple absolute."

The petitioners rely upon *May* v. *Heiner*, 281 U. S. 238. In that case the grantor retained a future life estate only. Upon her death her life estate was obliterated. No new estates were created, nor did the fee shift from one person to another. This Court held that there was no transfer intended to take effect at death. The facts in the instant case are totally dissimilar. The grantor retained the fee; the grantee had no estate at all, but merely a possibility of an estate, a contingent remainder. Upon the death of the grantor, the fee simple passed from him to his wife, and her contingent remainder became vested. A transfer of property from the dead to the living then took place.

The same essential facts distinguish the instant case from *Nichols* v. *Coolidge*, 274 U. S. 531, *Shukert* v. *Allen*, 273 U. S. 545, and the five trusts involved in *Reinecke* v. *Northern Trust Company*, 278 U. S. 339. In all of those cases the nontaxable transfer was single and complete, leaving no interest in the grantor under the terms of the conveyance. The property could not revest in the settlor. In the instant case, like that of *McCormick* v. *Commissioner*, No. 542, October Term, 1930, the grantor or settlor retained a reversionary interest and expected to keep the fee or regain the corpus of the trust unless a contingency occurred—namely his (or her) death prior to that of the grantee or the other beneficiaries. The interests are somewhat similar

to those in the two trusts in *Reinecke* v. *Northern Trust Co., supra,* where the settlor retained a power to revoke and regain the whole corpus until his death, and this Court held the transfers taxable. Until his death the grantor in the instant case retained control over the property and anticipated the return of the entire estate to him if he survived his wife. His death was the generating source of important accessions to the property rights of the grantee. Such a transfer is one intended to take effect at death within the meaning of Congress in the taxing statute. In reaching this conclusion the court below stated (R. 15–16):

> Until his death, however, the transfer was incomplete. Until that time the whole legal title to the fee, subject only to his wife's life estate, was vested in him as well as his vested remainder in fee of the entire reversionary interest. Until his death the possession or enjoyment by the decedent's wife of his vested remainder in fee was postponed. The decedent's death was the event which made the transfer complete and effective, and secured to Etta M. Klein the possession and enjoyment of the property contemplated by the statute. The acquisition by the wife of the full benefits of ownership of interest which remained in the decedent became complete only upon his death. It was, therefore, a transfer at his death. *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339;

McCaughan v. *Girard Trust Co.*, 11 Fed. (2d) 520; *Dean* v. *Willcuts*, 32 Fed. (2d) 374. We are of opinion, therefore, that the decedent had an interest in the property which was the subject of the instrument creating a life estate in his wife, the transfer of which interest took effect and was complete at his death, and that the value of this interest was a proper item to be included in the gross estate.

II

SECTION 402 OF THE REVENUE ACT OF 1918 IS NOT UNCONSTITUTIONAL WHEN CONSTRUED TO TAX THE TRANSFER

The petitioners contend that because the taxing statute was enacted after the delivery of the deed it is unconstitutional and in violation of the Fifth Amendment in that it is arbitrary and capricious in taxing the transfer which under that deed took effect on the grantor's death in 1919 after the passage of the statute imposing the tax.

The tax was assessed upon the value of the real estate diminished by the value of the grantee's life estate. In other words, the transfer occasioning the tax was the transfer on the grantor's death of his reversionary interest in fee to the grantee. While this transfer did not antedate the taxing statute, it was provided for irrevocably by the deed of July 1, 1918. But, at that earlier date the grantor must have anticipated a tax upon this future transfer. No new or unexpected tax is im-

posed upon an act nontaxable when done, as in *Untermyer* v. *Anderson,* 276 U. S. 440. The deed was dated July 1, 1918, almost two years after the first estate tax was imposed by the Revenue Act of 1916. Section 402 (c) of the 1918 Act, the statute in force at the grantor's death on September 17, 1919, is an exact reenactment (except for its parenthetical clause "whether such transfer or trust is made or created before or after the passage of this Act") of Section 202 (b) of the 1916 Act, *infra,* pp. 15–16. The Government's position on this question is fully set forth in its brief in No. 87, October Term, 1930, *Milliken* v. *United States,* at pages 9–15, and, therefore, is not repeated here. Moreover, the Government's position in the present case is even clearer than in the *Milliken case,* for in the present case the deed was executed after Section 201 of the Revenue Act of 1916 had been amended by Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and after the enactment of Section 900 of the Revenue Act of 1917, c, 63, 40 Stat. 300, 324–325. Under these Acts the rates in force at the time the deed was executed were substantially the same as those in force at the date of the death, so that the question of retroactivity is practically removed.

Moreover, we question whether the date of the deed is material. In *Reinecke* v. *Northern Trust*

Company, 278 U. S. 339, the tax upon the transfer at death of property conveyed under revocable trust instruments drawn in 1903 and 1910 was upheld in spite of the fact that the trusts were created before the passage of any statute imposing an estate tax. The excise tax in the present case is upon a transfer made after the enactment of the taxing statute. The Court of Claims decided such a tax was constitutional and not arbitrary, regardless of the date at which the ultimate transfer at death had been unalterably arranged, saying (R. 18, 19):

> The date of the execution of the trust, or conveyance, is not controlling but the important thing is whether under such instruments there remains in the decedent any interest in the property which passes at his death. In this case we think there was such an interest.

In *Coolidge* v. *Long*, 167 N. E. 757, now pending in this court as Nos. 33 and 34, October term, 1930, the Supreme Judicial Court of Massachusetts held valid a succession tax upon the ultimate transfer of the corpus of a trust created before the enactment of the State inheritance tax law.

Since the tax is laid upon the "privilege of transmission," a tax upon the property interest transferred upon the grantor's death in the present case is within the meaning of the statute and the power of Congress. As in *Tyler* v. *United States*,

281 U. S. 497, where property held by tenants by the entirety was included in the gross estate of the decedent, death "brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit,) to be measured in whole or in part by the value of such rights."

CONCLUSION

The opinion of the court below is correct and its decision should be affirmed.

Respectfully submitted.

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FEBRUARY, 1931.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provides in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages.]
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two

> years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, amended Section 201 of the Revenue Act of 1916, by increasing the rate of the tax.

Section 900 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 324, imposed a further tax in addition to the tax imposed by the Revenue Act of 1916, as amended by the Act of March 3, 1917, *supra*.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097, provides in part:

> SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages substantially the same as the tax imposed by the Revenue Act of 1916 as amended by the Act of March 3, 1917, and by the Revenue Act of 1917.]
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined

by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 387.—October Term, 1930.

Etta M. Klein, Former Administratrix of the Estate of Solomon Klein, Deceased, etc., et al., Petitioners,
vs.
The United States.

On Writ of Certiorari to the Court of Claims.

[April 13, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

The petitioners are the sole surviving heirs of Solomon Klein and distributees of his estate. He died intestate leaving, among other property, two parcels of land in Cook County, Illinois, which, some fifteen months prior to his death, he had conveyed to his wife, Etta M. Klein, by deed, the habendum clauses of which are as follows:

"First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

"Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever."

In auditing the estate tax return of the administratrix, the Commissioner of Internal Revenue included in the gross estate the value of these two parcels of land, after deducting therefrom the value of the life estate; and the tax thereto attributable was assessed against the estate. This was paid, and a claim for refund was rejected. Thereupon, petitioners sued in the Court of Claims to recover the amount. That court rendered judgment against petitioners. 42 F. (2d) 596.

The case turns upon the meaning and application of § 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, which provides that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, etc.—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, . . . intended to take effect in possession or enjoyment at or after his death . . ."

The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. The life estate is granted with an express reservation of the fee, which is to "remain vested in said grantor" in the event that the grantee "shall die prior to the decease of said grantor." By the second clause the grantee takes the fee in the event—"and in that case only"—that she shall survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee. The grant of the remainder, therefore, was contingent. See 2 Washburn Real Property (4th Ed.), pp. 547-548, 559, par. 1. The decisions of the Supreme Court of Illinois, the state where the deed was made and the property lies, support this conclusion. *Haward et al.* v. *Peavey*, 128 Ill. 430, 439; *Baley* v. *Strahan*, 314 Ill. 213, 217.

It is said that we must consider the deed as a whole; that since there is nothing in the granting clause to indicate the nature of the estate granted we must go to the habendum to determine that question; that the habendum consists of two clauses, one conveying a life estate, and the other the fee; and that "the greater estate or fee naturally swallows up the lesser or life estate when created by the same instrument." The principle invoked, however, does not help the petitioners, for certainly here the estates were not merged during the life of the grantor; and the deed evinces the clear intention of the grantor that they should not be. Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders. It is perfectly plain that the death of the grantor was the indispensable and intended event which

brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States*, 281 U. S. 497.

The provision of the Revenue Act of 1918, so far as it seeks to tax the transfer in question, is assailed as unconstitutional because, it is said, the transfer was complete and irrevocable before the act was passed. In support of this view *Nichols* v. *Coolidge*, 274 U. S. 531, and similar decisions of this court are cited. But the deed under review, while made before the enactment of the Revenue Act of 1918, was made after the Act of 1916, c. 463, 39 Stat. 756, 777, which, with an addition not pertinent here, contained (§ 202) exactly the same provision; and the contention, for that reason, other grounds aside, is without merit. *Milliken et al.* v. *United States*, — U. S. —, decided March 2, 1931, where the cases relied upon by petitioners are distinguished.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.